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Supreme Court of the United States

OCTOBER TERM 1950

No. 245

THE TODD COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Todd Company, Inc., (hereinafter sometimes referred to as the Petitioner) respectfully petitions for a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit, dated June 27, 1950, adjudging the Petitioner in contempt for having failed to comply with, disobeyed and violated a Decree of said Court of Appeals entered in the records of said Court April 19, 1949.

Concise Statement of the Matter Involved

The Petitioner herein is a corporation organized under the Laws of the State of New York, and is engaged in the business

of manufacturing machines for writing checks, bank checks printed on safety paper, and other related items. Early in February, 1944, Local No. 38 of the International Printing Pressmen and Assistants Union of North America was certified by the National Labor Relations Board (hereinafter sometimes referred to as the Respondent or the Board) as the sole collective bargaining agent for the mechanical employees of the Letterpress Department of the Printing Division of the Petitioner's plant as the result of a very close vote in an election held by Respondent (R. 27).

The collective bargaining negotiations which ensued and the various proceedings instituted by the National Labor Relations Board between February, 1944, and March, 1949, are set forth in detail in the affidavit filed by Petitioner in support of its Answer to the Petition for an Order Adjudging the Petitioner in civil and criminal contempt in the Court below (R. 27). It should be noted (and the fact is not disputed by the Respondent) that the employees in the unit on three occasions petitioned the Respondent for a decertification election, stating they no longer wished to be represented by the Printing Pressmen's Union. These Petitions were as follows:

(a) January 7, 1947—signed by 31 employees out of a total of 41 in the bargaining unit. Petition denied by Respondent without a hearing. (R. 32)

(b) August 30, 1949—signed by every employee in the unit. Withdrawn by the employees who petitioned, as the result of a statement by a representative of the Respondent that it could not be granted at that time, but should be filed later. (R. 33)

(c) January 4, 1950—signed by all employees in the unit. Denied without a hearing. (R. 35)

On April 19, 1949, on petition by the Respondent, the Court of Appeals for the Second Circuit duly entered its Decree enforcing the Order of the Board against the Petitioner herein. On June 8, 1950, the Board served on the Petitioner an Order to Show Cause, Petition to Adjudge in Civil Contempt and to Adjudge and Punish in Criminal Contempt, with supporting affidavits and exhibits, (R. 1), on the ground that Petitioner had not complied with said Decree of April 19, 1949. Petitioner herein duly filed and served its Answer with supporting affidavits (R. 25) and the matter was heard before the Court of Appeals for the Second Circuit on June 19, 1950. On June 27, 1950, the Court handed down its decision, which we quote in full:

> "Motion to adjudge in civil contempt granted with penalty of $1,000 with leave to move to impose an additional penalty per day in the event that our enforcement order is not complied with within ten days after June 27, 19[illegible] the date of this order. Motion to adjudge in criminal contempt denied." A.N.H. J.N.F., U.S.C.J.J. H[illegible]. U.S.D.J.

Statement with Respect to Jurisdiction

(1) Jurisdiction is invoked under the provisions of Section 1254 of Title 28 of the United States Code, (62 STAT. 928, 1948).

(2) The Order of the Court of Appeals for the Second Circuit was entered June 27, 1950. Petition to said Court for a stay of enforcement of the Order was duly made, and a stay granted on July 5 ,1950. until the Petitioner herein should apply to the Supreme Court for a stay, providing that application be made on or before July 25, 1950 (R. 42). On July 6, 1950, Petitioner applied to Mr. Justice Jackson, of the United States Supreme Court, for a stay, which stay was duly granted on the 10th day of July, 1950, providing a Petition

for Writ of Certiorari be filed on or before August 15, 1950. Petitioner herein has not complied with said Order of the Court of Appeals, Second Circuit, of June 27, 1950, nor with any part thereof.

(3) The Order of June 27, 1950, entered upon the Board's motion to adjudge Petitioner herein in civil contempt and to adjudge and punish in criminal contempt, without any findings or opinion in support of said Order, is in conflict with decisions of other Courts of Appeals; decides, without taking evidence or making findings, controverted material issues; decides important question of Federal Law in summary proceedings in a way probably in conflict with the applicable decisions of this Court and of other Courts of Appeals; and has so far departed from the accepted and usual course of judicial proceedings in such matters as to call for the exercise of the power of supervision of this Court.

(4) The following cases establish jurisdiction:

Times-Mirror Corp. v. *N. L. R. B.*, 331 U. S. 789,

Gay v. *Ruff*, 292 U. S. 25, 30,

Forsyth v. *Hammond*, 166 U. S. 506, 513.

The Questions Presented

The questions presented on this application are as follows:

(1) Where the Board's Petition and Affidavits disclose that collective bargaining negotiations have been carried on over a period of six to eight months, but allege that nevertheless the Todd Company had refused to bargain in good faith, and where the Answer and Answering Affidavits deny and controvert in several respects the material allegations of the Petition of the Board, may the Court summarily adjudge Petitioner in contempt for having negotiated in bad faith, and im-

pose a penalty without making findings, or filing an opinion identifying the acts or omissions which the Court adjudged constitute bad faith, or without referring the matter to a Master?

(2) Having issued a Decree requiring Petitioner, among other things, to recognize the rights of its employees guaranteed in Section 7 of the National Labor Relations Act to bargain collectively through representatives of their own choosing, may the Court summarily adjudge Petitioner in contempt for taking the position in collective bargaining negotiations that the contract offered by Petitioner should not include recognition of a Union by which the employees had stated they no longer desired to be represented, at least until they were allowed to express their choice in a formal election, and that the employees should not be coerced into representation they did not desire by any act of the Petitioner in contractually committing them to such representation against their express wishes?

Reasons Relied Upon for the Allowance of the Writ

The Order of the Court of Appeals dated June 27, 1950, summarily adjudging Petitioner herein in contempt without findings or opinion, and without reference of the disputed issues to a Master, leads to the inevitable conclusion that the Court has accepted as true certain material allegations of the Board's Petition which were controverted by the Answer of the Petitioner herein, and has effectually denied to Petitioner the right to present witnesses and their testimony, and to cross-examine the witnesses presented by the Board. The decision has further left unanswered, by reason of the lack of findings or opinion, the question of whether the Board's arbitrary refusals, made without a hearing, on three separate occasions, to entertain a Petition by the employees in the unit involved for a change of representation, were proper, and further whether

the Petitioner herein was justified, under the peculiar facts of this case, in refusing unconditional recognition of a Union certified six years previously, but rejected by the employees three times within a period of three years preceding the refusal. These issues the Petitioner, at its peril, must determine without benefit of findings or opinion of the Court.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, to the end that the Order of June 27, 1950, may be reveiwed and determined by this Court, as provided by the statutes of the United States; and that said Order of said Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem just and proper.

Dated: July 31st, 1950.

THE TODD COMPANY, INC., *Petitioner*,

By, ...

JUSTIN J. DOYLE, Esq.,

By, ...

CHARLES S. WILCOX, Esq.,
Counsel for Petitioner

EDWARD R. MACOMBER, Esq.,
of Counsel

Supreme Court of the United States

OCTOBER TERM 1950

No.

THE TODD COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

No opinion or findings were filed by the United States Court of Appeals for the Second Circuit. The Order adjudging Petitioner in contempt, which Petitioner herein seeks to have reviewed, dated June 27, 1950, appears in the Record at page 24 and is quoted in the Petition at page 3.

Jurisdiction

The basis of jurisdiction is set forth at page 3 of the Petition for the Writ, and in the interest of brevity is incorporated here by reference.

Statement of the Case

A concise statement of the case appears at page 1 of the Petition for the Writ, and in the interest of brevity is incorporated herein by reference.

Specification of Errors

The United States Court of Appeals for the Second Circuit erred:

(1) In adjudging Petitioner herein guilty of civil contempt in a summary proceeding, without findings or opinion, or reference to a Master, upon conflicting, verified allegations of material facts essential to the support of the contempt order.

(2) In failing to accept as true the material allegations of Petitioner's Answer and Affidavits attached thereto.

(3) In accepting as true the material allegations of the Board's Petition, although denied and not admitted in several respects in Petitioner's Answer.

(4) In failing to require the Board to prove by competent and material evidence the material allegations of its Petition which were denied, or which were not admitted in the Answer.

(5) In denying Petitioner herein the privilege of confronting the Board's witnesses, cross-examining them, and adducing evidence to disprove the material allegations of the Petition which were denied or not admitted in the Answer.

(6) In deciding the issues of fact joined in the pleadings material to the charge of contempt, upon such pleadings and the supporting affidavits.

(7) In deciding, upon conflicting allegations of the pleadings and contradictory statements of the supporting affidavits, that Petitioner herein had committed contempt of a Decree of the Court.

(8) In failing to resolve all reasonable issues and inferences from the pleadings in favor of Petitioner herein.

(9) In refusing, without stating any reason therefor in any opinion or finding, to pass upon Petitioner's contention

that the Board's several refusals to grant the Petitions of Petitioner's employees for an opportunity to express their preference with respect to collective bargaining representation, was a denial of the rights guaranteed to Petitioner's employees under Section 7 of the National Labor Relations Act, and was arbitrary and capricious.

POINT I

The Court erred in finding Petitioner guilty of contempt in a summary proceeding without reference, without findings, and without opinion, where the pleadings upon which the contempt order is based, by appropriate denials under oath in the Petitioner's return, put in issue some of the material allegations of fact necessary to support the order of contempt.

Where the pleadings join issue upon allegations of material facts necessary to sustain a contempt order, the Court may not in summary proceedings resolve the issues against the party respondent. In such instance the movant is required to prove its charges by competent and material evidence. In such case all reasonable intendments and inferences from the pleadings as a matter of law must be taken against the movant and in favor of the opponent. The Board should have been required to prove any facts material to the finding of contempt which were denied or which stood unadmitted in the Answer. Respecting charges in the Board's Petition necessary to sustain the Order of Contempt, and which are denied in the Answer, Petitioner should have been accorded the privilege of confronting the Board's witnesses, cross-examining them, and offering evidence to disprove such charges. The conflicting allegations created an issue on material facts necessary to sustain the Order and such issue should not have been decided upon the pleadings or

the Affidavits. The Order finding Petitioner herein guilty of contempt may not be determined in a summary proceeding without opinion or findings from conflicting allegations of the pleadings and contradictory statements of the Affidavits.

Times-Mirror Corp. et al., v. *N. L. R. B.*, 331 U. S. 789;

Virginia Railway Company v. *United States*, 272 U. S. 658, 675;

N. L. R. B. v. *Whittier Mills Co.* (C. C. A. 5), 123 F. (2d) 725, 727;

N. L. R. B. v. *Weirton Steel Co.* (C. C. A. 3), 146 F. (2d) 144, 145.

The following allegations of the Board's Petition were denied in whole or in part:

Paragraph III (R. 2)—alleged the decision upon which the Decree of the Court of Appeals was issued expressly rejected Petitioner's contention that it was not obligated to bargain with the Union because a majority of the employees had requested decertification. This was denied. (R. 25).

Paragraph IV (R. 3)—alleged that your Petitioner herein had refused and failed to bargain collectively in good faith. This was denied. (R. 25).

Paragraph V (R. 3)—Your Petitioner denies that during the negotiations with the Union it asserted that it would not consummate any agreement with the Union unless the Union first established its majority at an election. The Answer and supporting Affidavits clearly show that Petitioner offered a contract to the Union, restricted only as to recognition. (R. 25).

Paragraph VI (R. 3)—alleges that the Union and Petitioner reached an agreement on all disputed provisions, but

Petitioner refused to execute the agreement without an election. This Petitioner denied in its Answer. (R. 25).

Paragraph VII (R. 3)—Petitioner denied the allegation in this paragraph to the effect that it would not enter into a contract for a limited period unless an election was held. Petitioner in its Answer alleged under oath that with respect to this specification it merely took the position that the employees should not be contractually bound to representation they did not desire for a period longer than was necessary to enable them to have the issues determined by an election. (R. 25).

It can be easily discovered by an examination of the Petition and the matters placed in issue by the Answer, that in at least two material respects there were sharp issues of fact presented by the pleadings:

(1) Did the Petitioner refuse to sign a contract without a previous election, as alleged by the Board, or did it state that it was willing to sign a contract, but took the position that the recognition clause in said contract should become effective only after the wishes of the employees with respect to bargaining representation had been determined, as guaranteed them under the Act?

(2) Did the Petitioner refuse to sign a contract for a limited period unless and until an election was held, as contended by the Board, or did Petitioner take the position (as it contends) that the period of the contract should be no longer than the period necessary to enable the employees to have their wishes determined by an election as provided by the Act?

POINT II

The Court erred in refusing to review the arbitrary and capricious denials by the Board of the employees' petitions for decertification elections, or in the alternative, to pass upon Petitioner's contention that since the rights guaranteed to the employees under the act had been improperly denied them, Petitioner was under no obligation to take affirmative action which would deny to its employees the right guaranteed them under the act to be represented in collective bargaining by representatives of their own choosing.

We are well aware of the rule heretofore established by decisions of this Court, that representation certifications of the Board are, as a general rule, excluded from the review by Federal Appellate Courts authorized by the National Labor Relations Act, with respect to unfair labor practice charges, except in the circumstances specified in the Act.

A. F. of L. v. *N. L. R. B.*, 308 U. S. 401, 411;

N. L. R. B. v. *Falk Corp.*, 308 U. S. 453, 459.

Both cases, however, intimate that review may be had in instances where the Board has ordered the employer to do something predicated upon the results of an election, and *A. F. of L.* v. *N. L. R. B.*, *supra*, at page 459 quotes from the discussion of the National Labor Relations Act on the Senate floor as follows: "It provides for review in the Courts only after the election has been held and the Board has ordered the employer to do something predicated upon the result of an election. 79 Cong. Rec. 7658."

That is precisely the case here, for the Court of Appeals has ordered the Petitioner to do something on penalty of continuing fines.

We are likewise familiar with the line of decisions in the Courts of Appeal for several of the Circuits, that an employer may not refuse to bargain with an organization which has been duly certified, and then avail himself of the bargaining agency's loss of majority support which was presumably brought about by his own conduct. The rule, when based on a presumption reasonably inferred from the facts, is a just one, but the facts of the case at bar do not support such a presumption here. This rule has arisen in cases where the presumption was clearly justified—where the unfair labor practices found to exist were of a drastic and overt nature, such as:

(a) Supervisors in the plant discouraging employees from joining the Union, *Oughton* v. *N. L. R. B.*, (C. C. A. 3), 118 F. (2d) 486, 488,

(b) Employer threatening to close down the plant if the employees joined the Union, *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702,

(c) Employer calling a meeting of employees without notifying the Union representative, and stating that unless a wage cut were accepted by the employees the plant would close down, *N. L. R. B.* v. *Highland Shoe Inc.*, (C. C. A. 1), 119 F. (2d) 218, 219,

(d) Transferring employees from permanent to temporary status and discharging employees because of labor union activities, *Continental Oil Co.* v. *N. L. R. B.*, (C. C. A. 10), 113 F. (2d) 473, 484.

In this case there were no overt acts of intimidation or coercion so frequently referred to in the cases cited in support of the rule, but on the contrary:

(a) There was no refusal to bargain. There were numerous conferences, both before unfair labor charges

were filed in 1944, and following the Decree of the Court of Appeals in 1949 enforcing the Board's Order,

(b) The Union majority in 1944 was exceedingly small. The loss of it over a period of five years cannot be presumed to be the result of any conduct on the part of the Petitioner herein.

Clearly, the continued insistence of from three-fourths to a hundred per cent of the employees in the unit over a period of three years that they be allowed to have other representation, in the absence of a finding of coercive and intimidating conduct by the employer, shows that the Union had lost its support for reasons other than any act of Petitioner herein.

This is not merely a case where a Union or an employer seeks judicial review of an Order of the Board directing or refusing an election. The Petitioner here seeks a review of the decision that its conduct has been contemptuous in taking the position in negotiations with the Union that if a contract is to be signed, including exclusive recognition, recognition of the Union shall be conditioned upon the Union's demonstrating in a proper election that it is entitled to such recognition. It is one thing for the Court of Appeals to state that it will not review a decision of the Board refusing to grant a Petition for a decertification election signed by one hundred per cent (100%) of the employees involved, but it is quite another thing to hold the employer in contempt in his negotiations with the Union for refusing to ignore the expressed wish of one hundred per cent of his employees.

The situation presented by the facts of this case should be reviewed by this Court. It is not only important to employers of labor who may risk citations for alleged contemptuous conduct in attempting to protect what they believe to be the rights of their employees, guaranteed them by the Act, but it is like-

wise of great importance to employees subject to the National Labor Relations Act, since, if the Court of Appeals decision in this case is not reviewed, it results in the denial of rights given to the employees by Federal statute, by the process of compelling an employer, under penalty of contempt, to contractually recognize an organization they have expressly repudiated.

It is respectfully submitted that the admitted facts of this case clearly call for a study and limitation of the general rule based on the presumption heretofore referred to. Factual situations have required modification and limitation of the rule:

> *N. L. R. B.* v. *National Licorice Co.*, (C. C. A. 2) 104 F. (2d) 655; *mod.* 309 U. S. 359;
>
> *Hamilton Brown Shoe Co.* v. *N. L. R. B.*, (C. C. A. 8) 104 F. (2d) 49.

In the *Licorice Company* case the propriety of the Court's requiring a new election was apparently not raised by the Board before the Supreme Court.

The following facts, which we believe to be undisputed, take this case out of the general rule, and call for a ruling by this Court defining its limitations. These facts are:

(1) In February, 1944, (over six years prior to the bargaining negotiations undertaken by the Company) the complaining Union had been selected in preference to another Union by a very close majority. (R. 27.)

(2) The delay of five years which occurred between this election and the hearing of the Board's enforcement proceeding before the Court of Appeals has never been claimed to have been caused by the Petitioner, nor has the Petitioner been found guilty of any violation of the Act occurring after June, 1944.

(3) On January 7, 1947, almost three years after the Union had succeeded in obtaining certification by a bare majority, three-quarters of the employees in the unit evidenced their wish for other representation. (R. 32.)

(4) On August 30, 1949, the employees in the unit filed a Petition for a Decertification Election signed by 100% of them. (R. 33.)

(5) On January 4, 1950, the employees in the unit involved signed a Petition for Decertification signed by 100% of them. (R. 35.)

(6) In spite of repeated complaints from the men in the unit involved, through their representatives, that they no longer wished to be represented by the Uinon, and that they under no circumstances wished the Petitioner to sign a contract obliging them to be represented by this Union, the Petitioner for a period of seven months negotiated with the Union in an attempt to arrive at the terms of an agreement and an understanding as to how the question of recognition might be worked out. Negotiations were at no time broken off, and while the Union did not at any time agree to a Decertification Election, it at no time asserted that the Company was refusing to bargain during the period that the Petition of the employees for an election was being considered by the Regional Board and by the National Board.

(7) The Petitioner had never been adjudged guilty of the type of overt and intimidating unfair labor practices which had lead the Courts in other cases to say that such conduct might be construed to have caused a loss of Union majority.

Conclusion

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 245

THE TODD COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court below (R. 24) granting the motion of the National Labor Relations Board to adjudge petitioner in civil contempt for failure to comply with a decree of the court enforcing an order of the Board is not reported.

The opinion of the court below, granting enforcement of the Board's order in the unfair labor practice proceeding which culminated in the contempt order, is reported at 173 F. 2d 705.[1] The

[1] For the convenience of the Court we have requested the Clerk of the Court of Appeals for the Second Circuit to certify to this Court the printed record in the original unfair labor practice proceeding. References to the record in that proceeding will be designated "R. I."

findings of fact, conclusions of law, and order of the Board (R. I, 1–55) enforced by the court's decree in the unfair labor practice proceeding are reported at 71 NLRB 192.

JURISDICTION

The order of the court below holding petitioner in civil contempt was issued on June 27, 1950 (R. 24). The petition for a writ of certiorari was filed on August 11, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, when the pleadings disclose that petitioner disobeyed the court's decree, and no valid justification for such disobedience is offered, the court may properly adjudge petitioner in civil contempt on the basis of the pleadings.[2]

---

[2] Petitioner's question numbered "(1)" (Pet. 4–5), which suggests impropriety in the failure of the court below to make detailed findings concerning "the acts or omissions which the court adjudged constitute bad faith," rests upon the erroneous assumption that petitioner's good or bad faith in conducting negotiations with the Union was in issue in the civil contempt proceeding. The sole issue in that proceeding was whether petitioner's conceded refusal to recognize the Union as exclusive bargaining representative until a new election had been held violated the provision of the decree which required petitioner to recognize and bargain with the Union. Since only a question of law was presented, the propriety of the action of the court below in deciding that question on the pleadings is not subject to challenge.

2. Whether, when the court has enforced a Board order requiring an employer to bargain with a union, despite the union's loss of majority, the employer is justified in disobeying the decree by the fact that after issuance thereof the employees reasserted the union's loss of majority.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. III, 141, *et seq.*) are set forth in the Appendix, *infra,* pp. 20–23.

STATEMENT

Although petitioner[3] does not seek review of the unfair labor practice proceedings before the Board and the court below which culminated in entry of the decree for disobedience of which petitioner was adjudged by the court below in civil contempt, consideration of the question raised by the petition requires reference to those proceedings.

In accordance with Section 10 of the National Labor Relations Act, the Board, on October 4, 1946, issued its decision and order in the unfair labor practice proceeding (R. I. 1–55). Insofar as is here pertinent, the Board found as follows:

Pursuant to a consent election agreement

[3] Petitioner is a New York corporation with its principal office and plant at Rochester, New York, where it is engaged in the printing of safety checks and related items for banks and other business concerns (R. I. 16).

between petitioner and the Union,[4] the Union was designated, on February 14, 1944, by the majority of petitioner's employees in an appropriate bargaining unit,[5] as their exclusive bargaining representative (R. I. 17–18).

On February 21, 1944, the Union requested petitioner to bargain with it on behalf of the employees in the appropriate unit (R. I. 21). Numerous conferences between representatives of the Union and petitioner were held thereafter until sometime in December 1944, when negotiations ceased (R. I. 21–28). Negotiations were not resumed until after issuance of the decree of enforcement by the court below on April 19, 1949 (R. I. 8, 20).

During the entire course of negotiations between February and December 1944, petitioner maintained the position that, whatever agreement might be reached between the parties as to wages, hours, and conditions of employment, it was petitioner's established policy not to sign agreements with labor organizations and repeatedly informed the Union's representatives

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[4] International Printing Pressmen and Assistants Union of North America, Local 38, A. F. L. (R. I. 16).

[5] The unit found appropriate by the Board consisted of all the mechanical employees in the letter press department in the printing division of petitioner's Rochester, New York plant, exclusive of compositors, bindery employees, maintenance employees, supervisory, office and clerical employees (R. I. 17–18).

that petitioner would "never sign a contract with any union" (R. I. 21–28).

Also during the negotiations, in response to the Union's insistence upon a signed agreement, petitioner told Union representatives that petitioner had "spent $100,000 in 1937 to break the Lithographer's strike" and was "willing to do it again" (R. I. 21–22), that if the Union did not agree to petitioner's proposals, including the proposal that there be no signed agreement, petitioner could close the department in which the union members worked, or transfer the work to other plants (R. I. 26), and that even though petitioner's wartime priorities would probably be terminated if it failed to follow a directive of the War Labor Board awarding a signed contract to the Union, petitioner's president would not "care" because it was his "principle not to sign a contract" (*ibid.*).

Upon these facts the Board concluded that petitioner had refused to bargain with the Union, in violation of Section 8 (5) of the Act (R. I. 2–5), and had interfered with, restrained, and coerced its employees, in violation of Section 8 (1) of the Act, by threatening that, rather than sign a contract with the Union, it would use its financial resources to break the Union, and would shut down the department which the Union represented or transfer its work to other plants (R. I. 46).

Accordingly, the Board, on October 4, 1946, issued an order (R. I. 5–7) requiring petitioner to cease and desist from the unfair labor practices found and, upon request, to bargain collectively with the Union as the exclusive representative of its employees and, if an understanding were reached, to embody such understanding in a signed agreement.

About three months after issuance of the Board's decision and order, on January 7, 1947, 31 of petitioner's 41 employees in the appropriate bargaining unit filed with the Board a petition for leave to intervene (R. 32). The petition, which alleged that the employees did not desire to have the Union represent them, requested that the Board dismiss the unfair labor practice proceeding against the Todd Company, and terminate the authority of the Union, or of Elmer Bassett, its agent, to represent the employees, or in the alternative, conduct a new investigation and certification of representatives (*ibid.*).

On January 28, 1947, the Board, noting that its outstanding order of October 4, 1946, directing petitioner to bargain collectively with the Union, had not been complied with, denied the employees' petition (R. 32).

Thereafter the Board filed with the court below a petition for enforcement of its order, and the court below, on March 30, 1949, issued its opinion (R. 1; 173 F. 2d 705), sustaining the Board's findings of fact and conclusions of law, affirming

the Board's action in denying the employees' petition to intervene, and approving the Board's order. Thereafter, on April 19, 1949, the court below issued its decree (R. 1–2, 25) enforcing the Board's order in full.

Thereafter, on or about June 5, 1950, the Board filed with the court below a petition for an order requiring the Todd Company to show cause why it should not be adjudged in civil contempt by reason of its disobedience of the court's decree (R. 1–7).[6]

In support of its petition the Board alleged, insofar as is here material, upon information and belief, supported by appropriate affidavits and exhibits, as follows (R. 1–24):

On or about April 22, 1949, the Union and petitioner entered into bargaining negotiations pursuant to the decree of the court below (R. 3, 8) but at the outset of such negotiations, and thereafter in subsequent negotiations, petitioner asserted that it would not consummate any agreement with the Union unless the Union first established its majority at an election to be conducted by the Board (R. 3, 8–16). On or about November 9, 1949, although the parties had reached agreement on all disputed provisions of a proposed contract, petitioner insisted that before it would execute the agreement the Union's ma-

[6] The Board's petition also sought to have petitioner adjudged in criminal contempt (R. 4–7). However, the court below denied the petition in this respect (R. 24).

jority status must be determined at a Board election (R. 3, 10–11). On or about November 16, 1949, at a conference between representatives of petitioner, the Union, and the Board, petitioner stated that it was unwilling to enter into a contract, the effective date of which would extend beyond March 30, 1950, which was one year after the date of the decision of the court below granting enforcement of the Board's order and, according to petitioner, marked the end of its obligation to bargain with the Union (R. 3, 11–16). At the same time petitioner asserted that it would not enter into a contract, even for such limited period, unless the Union demonstrated in a Board election that it still represented the majority of the employees in question (R. 3–4, 11–12, 14–15).

Thereafter, on or about January 10, 1950, a petition for decertification of the Union was filed with the Board's Regional Office, supported by affidavits signed by petitioner's employees (R. 4, 12, 17). On or about January 26, 1950, the Board's Regional Director dismissed the petition for decertification on the ground that the Board's order, enforced by the decree of the court below, requiring petitioner to bargain with the Union, had not been complied with (R. 4, 12, 17). On or about February 21, 1950, the Board, having considered the decertification petition together

with a statement setting forth the position of the Company, sustained the Regional Director's dismissal on the ground that even assuming that the Union no longer represented the employees, no proceeding to determine representatives can be initiated while there is outstanding an unobeyed Board order directing the employer to bargain with the Union (R. 4, 17). On May 19, 1950, the Board denied a motion for reconsideration of its action and on May 24, 1950, so informed petitioner (R. 4, 24).

Upon the above allegations the Board requested the court below to issue an order to show cause requiring petitioner to answer the allegations of the Board's petition and to show cause why it should not be adjudged in civil contempt for having disobeyed, and continuing to resist and disobey, the decree of the court below entered on April 19, 1949 (R. 5). The Board requested further that upon the return of the order to show cause the court below adjudge petitioner in civil contempt and order petitioner to purge itself thereof by fully complying with the court's decree, posting notices of compliance, and paying costs (R. 5–6).

Under date of June 16, 1950, petitioner filed with the court below its answer to the Board's petition (R. 25–39). After admitting certain allegations contained in the petition and denying

others,[7] the answer admitted (R. 25), as alleged in paragraph V of the Board's petition (R. 3), that during the course of negotiations had with the Union on and after April 22, 1949, following issuance of the decree of the court below, peti-

[7] Petitioner admitted the allegations contained in the following paragraphs of the Board's petition (R. 25–26):

Paragraph I—statement of the bargaining requirement of the Board's order (R. 1–2); II—that petitioner had knowledge of the Board's order and the enforcement decree of the court below (R. 2); VIII—that a petition for decertification of the Union was filed by employees of petitioner on or about January 10, 1950, that said petition was dismissed by the Board's regional director on or about January 26, 1950, and that an appeal was taken to the Board (R. 4); IX—that on or about February 21, 1950, the Board, having considered the petition together with a statement of the Company, sustained the Regional Director's dismissal on the ground that even assuming that the Union no longer represented the employees, no proceeding to determine representatives can be initiated while there is outstanding, and uncomplied with, a Board order directing petitioner to bargain with the Union, and that the Board, on May 19, 1950, denied a motion for reconsideration of its action and, on May 24, 1950, so informed petitioner (R. 4).

Petitioner denied the allegations contained in the following paragraphs of the Board's petition:

Paragraph III—that in its decision upon which its decree was issued the court below expressly rejected petitioner's contention that it was not obligated to bargain with the Union because a majority of the employees in the appropriate unit had, subsequent to issuance of the Board's order, filed a petition with the Board requesting, *inter alia*, decertification of the Union (R. 2–3); IV—that ever since entry of the decree of the court below petitioner has refused and failed, and continues to refuse and fail, to bargain collectively with the Union as exclusive representative of its employees in the appropriate unit (R. 3); VI—that on or about November 9, 1949, the Union and petitioner reached

tioner "stated to the Union that it would not sign a contract with the Union unconditionally recognizing the Union as the sole collective bargaining agency for said employees [in the unit found appropriate by the Board] unless and until an election had been held and a majority of said employees had designated the Union for such representation purposes" (R. 25).

Petitioner's answer admitted further (R. 25–26), as alleged in paragraph VII of the Board's petition (R. 3–4), that at the November 16, 1949, conference between representatives of petitioner, the Union, and the Board, petitioner stated that if it should ultimately be determined that the employees were not entitled to a decertification election petitioner still did not propose to bind the employees to representation which they had stated they did not desire, for a period any longer than was necessary to enable the employees to have their wishes determined by an election, which petitioner allegedly understood from statements made by Board agents to be April 1950.

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agreement on all disputed provisions of a proposed contract, but that petitioner continued to insist that before it would execute the agreement the Union's majority status be determined at a Board election (R. 3); X—that, despite its knowledge of the Board's dismissal of the petition for decertification, petitioner persists in its refusal to bargain and refuses to comply with the decree of the court below (R. 4); XI—that by its acts and conduct described in the Board's petition to adjudge in contempt petitioner has been and continues to be in civil contempt of the court below (R. 4).

Thereafter, pursuant to oral argument and the submission of memoranda by the parties on the question whether petitioner's refusal to recognize the Union constituted a violation of the decree, the court below, on June 27, 1950, entered its order of contempt as follows (R. 24):

> Motion to Adjudge in Civil Contempt Granted with Penalty of $1,000. With Leave to Move to Impose an Additional Penalty Per Day in the Event That Our Enforcement Order Is Not Complied With Within Ten Days After June 27, 1950 the Date of This Order. Motion to Adjudge in Criminal Contempt Denied.

On July 5, 1950, pursuant to a motion by petitioner (R. 39–41), the court below entered an order staying execution and enforcement of its order of contempt until petitioner applied to this Court for a stay, provided such application be made on or before July 25, 1950 (R. 42). On July 6, 1950, petitioner applied to Mr. Justice Jackson for a stay which was granted on July 10, 1950, providing that petitioner file a petition for certiorari on or before August 15, 1950.

ARGUMENT

1. Since petitioner admitted, in answer to the Board's motion to adjudge it in civil contempt, that it refused to grant unqualified recognition to the Union, the sole question before the court was

whether the excuse advanced by petitioner for its refusal constituted legal justification.[8]

As petitioner concedes in its petition (Pet. 14), it "here seeks a review of the decision that its conduct has been contemptuous in taking the position in negotiations with the Union that if a contract is to be signed, including exclusive recognition, recognition of the Union shall be conditioned upon the Union's demonstrating in a proper election that it is entitled to such recognition." The Board did not dispute the fact alleged by petitioner as justification that, after issuance of the decree, the employees reasserted their desire not to be represented by the Union. The Board argued, however, that as a matter of law this fact did not exculpate petitioner.

The facts concerning petitioner's refusal to recognize the Union and its asserted defense being undisputed, no further facts were necessary to enable the court to pass upon the question whether

[8] That a refusal to grant unconditional recognition to the majority representative, absent a valid excuse, is an unfair labor practice is not open to dispute. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 383–384; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 683–684; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 358; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267.

petitioner's refusal to recognize the Union was in violation of the decree. It was thus immaterial whether other allegations of the Board's petition were denied by petitioner; a hearing to resolve such factual issues was unnecessary. Indeed, "a hearing on the issues presented would be a useless undertaking". *Reliance Manufacturing Co.* v. *National Labor Relations Board,* 143 F. 2d 761, 762–763 (C. A. 7); *National Labor Relations Board* v. *Tupelo Garment Co.,* 122 F. 2d 603, 605 (C. A. 5); *National Labor Relations Board* v. *Whittier Mills Co.,* 123 F. 2d 725, 727, 728 (C. A. 5); cf. *Fay* v. *Douds,* 172 F. 2d 720, 724–725 (C. A. 2).

The three contempt cases cited by petitioner (Pet. 10) are not to the contrary. Those cases, unlike the instant case, did not involve uncomplicated admitted facts which established the ultimate fact of disobedience of the court's decree. Moreover, the language of the *Whittier Mills* opinion, *supra* (Pet. 10), clearly supports the position of the Board here, rather than that of petitioner. *Virginian Railway Company* v. *United States,* 272 U. S. 658, 675, is not in point. It was not a contempt case but dealt merely with the general proposition that where, unlike the instant case, the basis of a court's order is not self-evident to the parties, the order should be accompanied by an opinion.

2. Petitioner does not challenge the validity of the decree of the court below enforcing the

Board's order,[9] and indeed is barred from doing so collaterally in the instant proceeding. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191–193; *Maggio* v. *Zeitz*, 333 U. S. 56, 68–69; *United States* v. *United Mine Workers*, 330 U. S. 258, 303; *Oriel* v. *Russell*, 278 U. S. 358, 363. Cf. *United States* v. *Mulcahy*, 169 F. 2d 94, 96 (C. A. 2), certiorari denied, 337 U. S. 956.

Petitioner's contention (Pet. 12–16) that it was justified in refusing to grant the Union exclusive and unqualified recognition, or, in other words, in refusing to bargain with the Union as required by the decree, because after issuance of the decree a majority of the employees in the appropriate unit reaffirmed their earlier determination that they no longer wanted the Union to represent them, is refuted by controlling decisions of this Court and presents no question requiring further review.

The law is settled that a union's loss of majority support among the employees in an appropriate bargaining unit, which occurs subsequent to the entry of a Board order requiring the employer to bargain with the union, and while the initial unlawful refusal to bargain upon which the order is based remains unremedied, does not affect the validity of the order or the propriety of its enforcement. *Franks Brothers Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705; *Medo Photo*

[9] Petitioner did not file a petition for certiorari in the unfair labor practice case, in which the decree of the court below was issued on April 19, 1949 (R. 1–2).

Supply Corp. v. *National Labor Relations Board,* 321 U. S. 678, 687; *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 340; *National Labor Relations Board* v. *P. Lorillard Company,* 314 U. S. 512; *National Labor Relations Board* v. *Mexia Textile Mills,* 339 U. S. 563, 568.[10]

It is equally clear that the fact that the employees may have manifested their repudiation of the union, as in the instant case, by filing with the Board a petition for decertification of the union under Section 9 (c) (1) (A) (ii), while the Board's order remains uncomplied with, does not affect the rule as to loss of majority established by the cited decisions of this Court, *supra.* See Brief for the Board in Opposition to Petition for Certiorari in *Tower Hosiery Mills, Inc.* v. *National Labor Relations Board,* No. 60, this Term (pp. 17–20), for discussion of this point.

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[10] Petitioner's contention that the principle in question should apply only where the unfair labor practices preceding the union's loss of majority are "of a drastic and overt nature" (Pet. 13) finds no support in the decisions cited or in the controlling decisions of this Court, *supra.* In any event, petitioner's assertion that in "this case there were no overt acts of intimidation or coercion" (Pet. 13, 16) is incorrect. The Board specifically found (*supra,* p. 5) that petitioner, in violation of Section 8 (1) of the Act, had threatened its employees that, rather than sign a contract with the Union, it would use its financial resources to break the Union and would shut down the department which the Union represented or transfer its work to other plants.

There is no claim that the representative status of the Union has been affected by events which occurred for the first time after issuance of the decree of the court below. Petitioner's only contention on this score is that the employees' reassertion of their original defection from the Union justifies petitioner's disobedience of the decree (Pet. 14–16). Petitioner's employees first repudiated the Union as their bargaining representative on January 7, 1947 (R. 32), about three months after issuance of the Board's order and before issuance of the decree below (R. I. 5–7; R. 33). After the court below, on April 19, 1949, issued its decree enforcing the Board's order the employees, on August 30, 1949 (R. 33), and again on January 4, 1950 (R. 35), reasserted their repudiation of the Union and filed decertification petitions with the Board. But clearly the latter circumstance gave petitioner no more warrant for disobeying the decree of the court below than the employees' initial defection gave it for refusing to comply with the Board's bargaining order before enforcement. Indeed it would be anomalous to hold that while an employer may not profit by his illegal acts by asserting a union's loss of majority following his unlawful refusal to bargain, as a defense to enforcement of the Board's bargaining order, he may ultimately achieve the same end by asserting the same loss of majority as a defense to a charge of contempt for refusing to obey the court's decree enforcing the Board's

order. Obviously, if the principle in question is to be effective at all in a fact situation such as that presented here, it must be adhered to at the contempt stage of the case as well as at the enforcement stage.

The determination of the court below to this effect accords with the expressed views of this Court. For petitioner did not appeal from the decree of the court below, but "undertook to make [its] own determination of what the decree meant" and "knew [it] acted at [its] peril" in taking such "calculated risk."[11] *McComb* v. *Jacksville Paper Co.*, 336 U. S. 187, 191–193. To condone petitioner's flouting of the court's unchallenged decree in the manner in which it has, would, as this Court observed in the *McComb* case, *supra,* "give tremendous impetus to the program of experimentation with disobedience of the law which we condemned in *Maggio* v. *Zeitz* * * *"

[11] In an earlier decision in *National Labor Relations Board* v. *Consolidated Machine Tool Corp.*, 167 F. 2d 470, the court below had also held that the Board could properly reject an employees' petition for an election, on the ground that the court's decree enforcing the Board's bargaining order had not been complied with. And in its decision upon the Board's petition for enforcement of its order in the instant case the court below cited this Court's decision in the *Franks Bros.* case, *supra*, in reaffirming the same principle (173 F. 2d, at p. 707).

336 U. S., at p. 192. See the *Maggio* case,[12] 333 U. S. at p. 69, and the cases cited *supra*, p. 15.

CONCLUSION

The decision below is clearly correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1950.

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[12] In the instant case there is no question of failure of the Board or the court below to give proper consideration to evidence or contentions of the party found guilty of contempt, such as was present in the *Maggio* case. In that case the court of appeals presumed that the contemnor had in his possession the subject matter of the turnover order there involved, despite evidence and contentions to the contrary. 333 U. S., at pp. 77–78. Here the Board and the court below assumed that petitioner correctly asserted that the Union had lost its majority but held, in accordance with authority, that this fact was immaterial to the question of the validity of the bargaining order and the propriety of its enforcement (R. 4, 24, 25; 173 F. 2d, at p. 707).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

ployees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); * * *"

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the en-